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In the Supreme Court of the United States

OCTOBER TERM, 1954

No. —

UNITED STATES OF AMERICA, PETITIONER

v.

SIMON J. KATZ, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

The Solicitor General, on behalf of the United States, prays that a writ of certiorari issue to review the judgment entered on June 7, 1954, by the United States Court of Appeals for the First Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals (App. 1a-5a) is not yet reported. The district court did not write an opinion.

JURISDICTION

The judgment of the Court of Appeals was entered June 7, 1954 (App. 6a). The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1).

QUESTION PRESENTED

Whether the hearsay rule prohibits expert witnesses testifying as to the market value of condemned property from stating on direct examination the prices paid in comparable sales upon which they relied in reaching their opinions.

STATEMENT

On April 17, 1951, the United States instituted proceedings to condemn 24.11 acres of land in Springfield, Hampden County, Massachusetts, for use in connection with the Springfield Armory. The land was owned by Simon Katz and members of his family. $55,000 was deposited as estimated compensation for the property, upon the filing of a declaration of taking. At a jury trial for the determination of just compensation for the property, the landowners' expert appraisers valued the property at $260,000, $292,443, and $322,575.18 (R. 3, 6, 7). The Government's appraisers valued the property at $55,000 and $70,000 (R. 13, 16). The land was assessed in 1951 at $58,900 (R. 2). Seven months prior to the taking, the landowners purchased the tract for $40,000, but claimed that it was a forced sale and not on the open market (R. 4-5). The jury returned a verdict of $121,500 (R. 23).

During the direct examination of its experts, the Government offered to prove several sales of comparable properties which they had taken into consideration in arriving at their estimate of the market value of the condemned property, including the prices for which the various properties were sold.

This testimony was to be based upon knowledge gained from examination of deeds and revenue stamps, upon conversations with other brokers who participated in the sales, and upon the experts' familiarity with transactions in the neighborhood involving property in which they were interested (R. 9-10, 12, 14-15). The trial court refused to allow such testimony on the ground that it was hearsay, stating that it would, however, adopt a different standard on cross-examination. This ruling permitted the witnesses to state the sales which they had considered, but not the sales prices (R. 10-12, 14).

Upon appeal by the United States, the Court of Appeals affirmed, stating, "we are not aware of any persuasive reason of necessity, or even of convenience, calling for a departure from the hearsay rule to admit such evidence" (App. 3a). Its opinion concluded, however (App. 5a):

> We are loath to circumscribe a trial court's discretion, however, by laying down a rule of law prohibiting an expert witness from ever giving the hearsay grounds upon which his opinion rests on direct examination. Perhaps there may be situations in which a trial court would think it helpful to permit a witness to give the basis, even if resting upon hearsay, for his opinion. We therefore sustain the ruling of the court below on the ground that no abuse of discretion is shown, rather than upon the accuracy of the ruling as a matter of law.

REASONS FOR GRANTING THE WRIT

1. The Court of Appeals recognized that, as stated by the district court, the decision in *United States* v. *5139.5 Acres of Land,* 200 F. 2d 659 (C. A. 4), was "directly in point" (R. 10) but it refused to follow that decision (App. 2a). There is therefore, a direct and recent conflict between the First and Fourth Circuits. As shown below, the opinion of the First Circuit is also inconsistent with views expressed by other federal courts, as well as with the majority rule now prevailing in the state courts.

2. The ruling in the present case is based on the view that the admission of evidence of sales of comparable property by experts who have not participated in the sales is a departure from the hearsay rule. But as the Fourth Circuit pointed out in the *5139.5 Acres of Land* case, *supra* (p. 662), there is a recognized exception to the hearsay rule when an expert is testifying as to value. "He may consider the cost and price of the property, the value of sales of similar property, the result of inquiries made of others, and like matters, which would ordinarily fall in the category of hearsay." *H. & H. Supply Co.* v. *United States,* 194 F. 2d 553, 557 (C. A. 10). And this exception does not, as the opinion below seems to indicate (App. 4a-5a), simply mean that the expert may consider such matters, but is nevertheless precluded by the hearsay rule from testifying as to those matters upon which his opinion is based. On the contrary, the expert is permitted to state such facts to inform the jury upon what he had "relied in reaching his con-

clusions." *H. & H. Supply Co.* v. *United States, supra.* For, as the Fourth Circuit earlier pointed out in *United States* v. *25.406 Acres of Land,* 172 F. 2d 990, 993 (C. A. 4), certiorari denied, 337 U. S. 931:

> Testimony as to value would be worth little or nothing, if witnesses were not allowed to explain to the jury their qualifications as experts and the reasoning by which they have arrived at the expert opinion to which they testify; and the rule is that they may thus give the grounds of their opinions.

There are, we believe, persuasive reasons of convenience, if not necessity, for the existence of this exception to the hearsay rule. In *United States* v. *5139.5 Acres of Land, supra,* the court stated (200 F. 2d at 662) that "it would unduly hamper the production of such testimony and needlessly prolong the trial to require that the sales be proved with the particularity that would be necessary in suits to enforce the contracts relating thereto." The requirement that a party to the sale itself, or the broker or agent who effected it, be produced as a witness obviously would lengthen the trial, particularly in cases where there are a substantial number of sales relied upon as comparable by one or the other of the parties. Such a requirement would likewise hamper the orderly presentation of evidence since the testimony as to the prices of the sale would have to be correlated with the evidence of the expert witness that the land involved

in the particular sale was comparable to that being valued. In this connection, the burden imposed upon the parties to the various comparable transactions who have to be summoned as witnesses cannot be ignored.

The suggestion of the opinion below that the facts testified to by the expert witness may not be accurate because they are hearsay, overlooks the fact, pointed out in *United States* v. *5139.5 Acres of Land, supra,* at p. 662, that if the expert has not made careful inquiry as the basis of his opinion, "this will be developed on cross examination and will weaken or destroy the value of the opinion. Ordinarily evidence as to facts of this sort given by an expert as the basis of his opinion as to value comes with a sufficient guaranty of trustworthiness to justify the relaxation of the hearsay and best evidence rules."

The First Circuit also takes the position that information as to prices gleaned from recitations of considerations in deeds in the registry, or revenue stamps affixed thereto, does not give any real help in arriving at value. But in *Ramming Real Estate Co.* v. *United States,* 122 F. 2d 892, 895 (C. A. 8), the court held:

> * * * we think the amount of revenue stamps attached to the deeds may be said to have been a reliable source of information as to the amount of the consideration paid for the property described therein. Here, again, the argument is one that may well have been addressed

to the jury as affecting the weight of the testimony, rather than going to its admissibility.

The fact is that experience in cases where expert witnesses testified to the prices of the sales which they considered to be comparable, the hearsay objection not having been raised specifically, shows that such evidence is reliable. See, e.g., *United States* v. *Ham,* 187 F. 2d 265 (C. A. 8); *United States* v. *Lambert,* 146 F. 2d 469, 472 (C. A. 2); *Fain* v. *United States,* 145 F. 2d 956 (C. A. 6); *Westchester County Park Commission* v. *United States,* 143 F. 2d 688 (C. A. 2), certiorari denied, 323 U. S. 726; *Knollman* v. *United States,* C. A. 6, decided June 11, 1954. And the many sales discussed in these cases, in most of which it was the pattern of value indicated by the sales rather than any particular price that was important, vividly illustrate the impediment to an expeditious trial which the rule of the instant case would impose. Also, when movable property is being valued, the rule of the instant case would make the trial very difficult. For example, in *United States* v. *Toronto Nav. Co.,* 338 U. S. 396, sales in Florida and the Great Lakes area were involved in a case heard by the Court of Claims.

The court below apparently agreed with the trial court's view that it would not so apply the hearsay rule on cross-examination (R. 10). But, so far as hearsay is concerned, the situation would seem to be the same whether the question is asked on direct or on cross-examination. In the field of expert evi-

dence of valuation, a minority of the courts have taken the view, not because of the hearsay rule but for fear of injection of collateral issues, that witnesses should not be allowed to state the prices paid in comparable sales on direct examination and could only do so insofar as the opponent might bring them out on cross-examination. The position of the Court of Appeals that to admit the testimony as to sales prices "would lead the trial astray into a host of collateral issues which could only obscure the main one and needlessly prolong the trial" (App. 5a), is substantially a statement of the reason for the minority rule excluding evidence of comparable sales on direct examination.[1] But the federal courts have not followed this minority view (see, e.g., *United States* v. *Certain Parcels of Land,* 144 F. 2d 626 (C. A. 3) and *supra,* pp. 4-7), and in recent years the rule has been expressly rejected in New York, which was once one of its leading exponents. *Village of Lawrence* v. *Greenwood,* 300 N. Y. 231, 90 N. E. 2d 53. See also: Orgel on *Valuation Under Eminent Domain,* 2d ed., Vol. 1, secs. 137-145;

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[1] These objections, if valid, would equally apply if the expert had personal knowledge of the sales and are thus unrelated to the hearsay rule. The ruling of the district court seems likewise to have been based on the objections found by the minority of courts to admission of evidence of prices of comparable sales and not the hearsay rule. This is indicated by the distinction made by the trial court between testimony of the fact of the comparable sale, which it permitted, and testimony of the price of the sale, which it excluded. This is the result reached under the minority rule even though all of the testimony would be hearsay in the absence of personal knowledge of the sale.

Note, 1939, 118 A. L. R. pp. 869-914, Supplement 174 A. L. R. pp. 386-401. The possible disadvantage of leading the trial astray into collateral issues likely to confuse the fact finders and prolong the trial was, the New York Court of Appeals concluded, more than compensated by the benefit to be gained from the receipt of such evidence. This conclusion is amply sustained by the examples referred to above (p. 7) showing that the trial is not embarrassed by such evidence. Rather, the admission of the prices of comparable sales furnishes the jury a realistic basis for weighing the opinion of the experts.

The Nebraska court has likewise recently overruled its former decisions following the minority rule and adopted the view that such evidence is admissible on the ground that the objection to it is outweighed "by its value in aiding the jury to a correct conclusion." *Langdon* v. *Loup River Public Power District,* 142 Neb. 859, 8 N. W. 2d 201. See also *Town of Williams* v. *Perrin,* 70 Ariz. 157, 217 P. 2d 918, where the court, not having previously passed upon the question, adopted the prevailing view.

The opinion below suggests that circumstances might exist where the trial court would have discretion to admit hearsay testimony from an expert if it "would think it helpful" (App. 5a). But certainly the application of the hearsay rule is not optional with the trial court. And the ruling in the instant case was not based upon factors relevant to the particular sales in question, such as time of

the sale, character of the property and the like,[2] but was, like the ruling of the trial court which was reversed by the Fourth Circuit in *United States* v. *5139.5 Acres, supra,* founded on the conclusion of law that the exception to the hearsay rule did not exist (R. 9-12). See also *Knollman* v. *United States,* C. A. 6, decided June 11, 1954.

3. The conflict of view represented by the decisions discussed above presents a question of great importance in the conduct of valuation proceedings. The problem necessarily arises in all cases where the testimony of expert witnesses is presented. The widespread effect on the business of federal courts of unjustified impediments upon the prompt disposition of valuation cases is indicated by the volume of condemnation cases alone. In each of the fiscal years between 1948 and 1953, new condemnation cases ranging in number from 544 to 991 were filed.[3] Annual Report of the Director of the Administrative Office of the United States Courts, 1953, p. 102, Table C-2, pp. 148-149. In 1953, condemnation cases represented almost 10% (245) of the 2,589 civil jury trials begun in federal district courts, and 73 others were tried by the court. *Ibid,*

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[2] This is apparent from the fact that the court permitted testimony as to everything but the price of the sale.

[3] In most condemnation cases, several tracts in different ownerships, each representing in fact a separate suit, are joined in a single complaint. The records of the Department of Justice show a general average of about 10 tracts to a case as demonstrated by the fact that the 2624 condemnation cases pending at the close of fiscal 1954, involved a total of 26,667 separate tracts.

Table C-7, pp. 166-169.[4] Many more cases, for which statistics are not available, were referred to commissioners. In addition, the same valuation issue is presented in various other types of cases such as suits against the United States for the taking of property and suits relating to breach of contracts or leases.

For the reasons previously discussed, we believe that the application of the rule of the instant case would seriously impede the trial of all such cases, and especially in the common situation where there is no particular sale of property closely similar to the property being valued, but the substantial number of recent sales clearly indicates the trend of prices in the vicinity. This difficulty in proving one of the most important factors in valuation would greatly increase the hazard of an unfair result and is unwarranted since adequate safeguards against mistakes are available.

CONCLUSION

There is a square conflict of circuits; the decision below is wrong and will hinder valuation proceedings; the issue is important. It is respectfully submitted, therefore, that this petition for a writ of certiorari should be granted.

SIMON E. SOBELOFF,
Solicitor General.

AUGUST, 1954.

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[4] Frequently, several tracts embraced in the same or different complaints will be consolidated for a single trial.

APPENDIX

IN THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

No. 4808

June 7, 1954

UNITED STATES OF AMERICA, APPELLANT

v.

SIMON KATZ, ET AL., APPELLEES

Appeal from the United States District Court for the District of Massachusetts

ELIZABETH DUDLEY, Attorney, with whom PERRY W. MORTON, Assistant Attorney General, HARRY T. DOLAN, Special Assistant to the Attorney General, ANTHONY JULIAN, United States Attorney, PHILIP P. A. O'CONNELL, Special Assistant to the U. S. Attorney, and ROGER P. MARQUIS, Attorney, were on brief, for appellant.

J. BURKE SULLIVAN, with whom EDWARD U. LEE was on brief, for appellees.

Before: MAGRUDER, Chief Judge, and WOODBURY and HARTIGAN, Circuit Judges.

WOODBURY, Circuit Judge:

This is an appeal by the United States from a judgment entered on the verdict of a jury awarding $121,500 as compensation for a 24.11 acre tract

of land in Springfield, Massachusetts, which was condemned and taken by the United States for military purposes. The only question presented is whether the District Court erred in refusing to permit the government's expert witnesses on value to state on direct examination what they believed or understood to be the prices paid at about the time of the taking for comparable lands in the area. More specifically, the District Court ruled "as a matter of law, and as a matter of discretion if not as of law," that it would not allow the government's experts to testify on direct examination as to the prices paid at about the time of the taking for other similar lands in the vicinity if their information was not based upon personal observation or participation in the particular transaction involved, but was based only upon talk on the street or in the real estate trade, or recitations of consideration in, or computations from internal revenue stamps affixed to, deeds on file in the Registry.

The District Court clearly understood that its ruling conflicted with the holding of the Court of Appeals for the Fourth Circuit in *United States* v. *5139.5 Acres of Land etc.*, 200 F. 2d 659 (1952). With due deference to the Court of Appeals for that Circuit, we agree with the District Court.

We said in *Baetjer* v. *United States,* 143 F.2d 391, 397 (1944) cert. denied 323 U. S. 772, and we repeat, that usually, in the absence of recent voluntary sales of the condemned land itself, the best evidence of value available is the prices at which

comparable lands in the vicinity of the land condemned change hands in voluntary transactions at about the time of the taking. This does not in any way imply that hearsay evidence is admissible to show the prices paid in voluntary transactions involving reasonably similar lands having the requisite propinquity in time and distance. And we are not aware of any persuasive reason of necessity, or even of convenience, calling for a departure from the hearsay rule to admit such evidence. On the contrary, we said in the *Baetjer* case that the motivation behind transactions in other lands can always be shown to affect the evidentiary value, but not the admissibility, of testimony as to the prices paid in such transactions, and certainly most transactions are likely to be influenced by the motives of the parties thereto, such as the special needs or the strong desires of the buyer, the financial or other exigencies of the seller, and the whims, follies, fancies or ignorance of local values on the part of one or both of them. Since these are all matters which persons with only hearsay knowledge of a sale can be expected to know little or nothing, whereas those with firsthand knowledge, such as a party to the sale itself or the broker or agent who effected it, can be expected to know at least something, we think the hearsay rule should be adhered to in the interest of justice to both parties. Nor does information as to prices gleaned from the recitations of consideration in deeds in the Registry, or revenue stamps affixed thereto, give any real help in arriving at value. More often

than not the true consideration paid is not stated in a deed, there appearing only a formal statement of consideration. And the value of the revenue stamps affixed to a deed is determined by the consideration paid exclusive of the value of liens or encumbrances at the time of the sale, I.R.C. § 3482, so that accurate knowledge of the price paid cannot be calculated from revenue stamps without accurate knowledge of the value of liens and encumbrances on the land at the time of the sale which might or might not appear in the records of the Registry.

But the government contends that even though the testimony of its experts as to the prices paid for comparable lands in transactions as to which they had no firsthand knowledge was not admissible as substantive evidence to prove those prices, still they should have been allowed to testify as to those prices on direct examination to show the jury the basis upon which their opinion of value rested. We do not agree.

It is true that the specialized knowledge of expert witnesses is usually derived in part, and may be derived wholly, from hearsay sources, such as statements in text books and the instruction imparted by teachers and others in the particular field involved. But it does not follow from this that an expert witness may bolster his ultimate opinion of value by telling the jury what others told him. The principle was succintly expressed by Mr. Justice Holmes when Chief Justice of the Supreme Judicial Court of Massachusetts in *National Bank of*

Commerce v. *New Bedford,* 175 Mass. 257 (1900) wherein he said: "An expert may testify to value, although his knowledge of details is chiefly derived from inadmissible sources, because he gives the sanction of his general experience. But the fact that an expert may use hearsay as a ground of opinion does not make the hearsay admissible." The reason for the rule is obvious. Any expert deserving the name must of necessity assimilate prior learning, rejecting some and accepting some as his experience dictates, and to permit him on direct examination to develop the hearsay basis for his opinion would lead the trial astray into a host of collateral issues which could only obscure the main one and needlessly prolong the trial.

We are loath to circumscribe a trial court's discretion, however, by laying down a rule of law prohibiting an expert witness from ever giving the hearsay grounds upon which his opinion rests on direct examination. Perhaps there may be situations in which a trial court would think it helpful to permit a witness to give the basis, even if resting upon hearsay, for his opinion. We therefore sustain the ruling of the court below on the ground that no abuse of discretion is shown, rather than upon the accuracy of the ruling as a matter of law.

The judgment of the District Court is affirmed.

UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

No. 4808

UNITED STATES OF AMERICA, PETITIONER, APPELLANT,

v.

SIMON J. KATZ ET AL., CLAIMANTS, APPELLEES.

JUDGMENT

June 7, 1954.

This cause came on to be heard on the record on appeal from the United States District Court for the District of Massachusetts, and was argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The judgment of the District Court is affirmed.

By the Court:

(S.) ROGER A. STINCHFIELD,
Clerk.

[cc. Messrs. Morton and Sullivan.]

Thereafter, to wit on June 23, 1954, mandate issued and the original papers were returned to the Clerk of the United States District Court for the District of Massachusetts.

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FILED
SEP 22 1954
HAROLD B. WILLEY, Clerk

Supreme Court of the United States.

OCTOBER TERM, 1954.

No. 297.

UNITED STATES OF AMERICA,
Petitioner,

v.

SIMON J. KATZ ET ALS.,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

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Supreme Court of the United States.

October Term, 1954.

No. 297.

UNITED STATES OF AMERICA,
Petitioner,

v.

SIMON J. KATZ et als.,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

The respondents pray that this Court refuse to issue a writ of certiorari to review the judgment entered on June 7, 1954, by the United States Court of Appeals for the First Circuit.

Jurisdiction.

The respondent respectfully suggests that this Court has no jurisdiction in the matter because the Court below sustained the trial judge on the basis that the exclusion of the testimony (as will appear hereinafter in this brief) was a proper exercise of discretion; and therefore no conflict exists between decisions of the First and Fourth Circuits, because in the case cited by the petitioner in the

latter circuit the decision of the Court of Appeals concerned itself with testimony which had been excluded in the trial Court on the basis of a ruling that such testimony was inadmissible as a matter of law.

Counter Question Presented.

Whether the trial Court properly exercised its discretion in refusing to permit expert witnesses testifying to the market value of the condemned property to state the prices paid in sales of other parcels of land where their knowledge of such prices was derived from talking with anonymous real estate brokers or from revenue stamps on deeds or from what the trial Court termed "gossip in the trade."

Counter Statement.

On April 17, 1951, the United States appropriated to the public use the property owned by Simon Katz *et als.*, located in East Springfield, Massachusetts. Subsequently, all the legal requirements necessary for establishing the title of the United States in the said property having been complied with by the Government, the issue of its fair market value was tried to a jury on October 30, 1953.

The land involved was an area of 24.11 acres and at the time of condemnation was the only property of its size and character available for industrial development in the City of Springfield (R. 7). The landowners had acquired the property on August 30, 1950, for $40,000 by purchase from the Indian Motorcycle Co. The seller company at the time of the sale was insolvent. It had a credit agreement with banks which was in default. Mortgages on the property also were in default. The landowners' offer of $40,-

000 was submitted to the Board of Directors of the Indian Motorcycle Co., who accepted it without first obtaining the appraisal of the subject property. At that time the Company needed $36,000 to meet mortgage payments (R. 5).

Counsel for the Government attempted to introduce evidence of the prices paid in sales of other industrial areas through direct examination of his expert witnesses. On objection the proffered testimony was excluded, the Court ruling as a matter of both law and discretion that it was *unreliable hearsay.* The Government's rights were duly preserved. It appeared from the offers of proof made by the Government's counsel that the said expert witnesses participated neither as buyers, sellers nor brokers in the sales sought to be introduced, but their knowledge of the purchase price in each instance was derived from recitals in a deed, revenue stamps upon a deed, or from information gained from other brokers (R. 12).

Parenthetically, it should be pointed out that the statement appearing in the Government's petition for certiorari at page 3 that such information was based "upon conversations with other brokers who participated in the sales" is wholly unsupportable (R. 9-10, 12, 14-15). It did not appear that the anonymous brokers from whom the witnesses allegedly procured the information had participated in the sales they discussed. Furthermore, nowhere in the offers of proof was it stated exactly what the sales prices were that the expert witnesses would have testified to had such testimony been allowed (R. 9, 10, 11, 12, 14, 15).

Three expert witnesses produced by the landowners variously testified that the land in question on the date of condemnation had a value of $260,000, $292,443, and $322,575.18; two witnesses presented by the Government ascribed values of $55,000 and $70,000 as of the same critical date. After deliberation the jury returned its verdict in

the sum of $121,500, from which the Government took the appeal to the United States Court of Appeals.

In affirming the action of the trial Court the Court of Appeals sustained the action of the Court below on the ground that no abuse of discretion was shown, stating: "We are loath to circumscribe a trial court's discretion, however, by laying down a rule of law prohibiting an expert witness from ever giving the hearsay grounds upon which his opinion rests on direct examination. Perhaps there may be situations in which a trial court would think it helpful to permit a witness to give the basis, even if resting upon hearsay, for his opinion. We, therefore, sustain the ruling of the Court below on the ground that no abuse of discretion is shown, rather than upon the accuracy of the ruling as a matter of law."

Reasons why Writ should Not Issue.

There is no direct and recent conflict between the First and Fourth Circuits by reason of the decision of the instant case on June 7, 1954 (C.A. 1), and the decision in *United States* v. *5139.5 Acres of Land*, 200 F. (2d) 659 (C.A. 4).

In the latter case the testimony as to sales of similar lands by an expert appraiser was excluded because the records were not produced or the persons who had participated in the sales were not called as witnesses. The exclusion was based on a ruling by the Court that the proffered evidence was inadmissible as hearsay. The Court of Appeals, in recognizing the importance of distinguishing whether the proffered testimony had been excluded as an exercise of the Court's discretion rather than as a matter of law, said at pages 661-662: "While the admission of testimony of this sort was a matter very largely

within the sound discretion of the trial judge the exclusion here [*i.e.*, in *United States* v. *5139.5 Acres of Land, supra*] *rested not upon a sound exercise of that discretion,* but upon an erroneous application of the hearsay and best evidence rule." (Italics ours.)

Obviously, if the trial judge in that case had rested the exclusion of the testimony of sales of other land upon a sound discretion, his action would not have been disturbed by the Court of Appeals for the Fourth Circuit.

In the instant case the trial judge had an opportunity to observe at least one of the witnesses through whom the proffered testimony was to be presented. He had before him testimony to the effect that there was not available in the City of Springfield another parcel of land possessing equally all of the desirable features of the condemned property (R. 7).

Furthermore, the basis of the exclusion was announced in the alternative by the trial judge (R. 12) "as a matter of law and as a matter of discretion if not as of law."

Although the Court of Appeals seems to have discussed the issue presented by the exclusion of the testimony as a matter of law, it finally resolved the matter by sustaining the Court below on the ground that its action was a proper exercise of discretion.

As was emphasized in *United States* v. *Nickerson,* 2 F. (2d) 502, 503, "Broad discretionary powers are vested in the trial court *particularly in a land damage case.*" (Italics ours.)

Even if it should be found that the trial judge excluded the testimony solely as a matter of law and even if, despite the plain meaning of the language employed, it should be found that the Court of Appeals sustained the exclusion on the same basis, there is still abundant reason why the writ should not issue.

The only reasons advanced by the petitioner for suspending the hearsay rule to permit witnesses to testify to sales of other land of which they have no direct knowledge are reasons of convenience and necessity (Petitioner's Brief, 5). Admittedly it would be more convenient if some witnesses were eliminated from the trial of a case. Convenience, however, seems a perilous base for argument when we consider the importance of the rights involved in trial. No authorities need be cited for the proposition that the Court seeks only to obtain justice for litigants, unhampered by considerations of necessity or convenience.

It seems to us a compelling observation that, in any event, if the producing of eye-witnesses is to be dispensed with by waiving the provisions of the hearsay rule, such a procedure will accomplish little from the standpoint of expediting the trial. It would merely shift the burden of producing the direct witness to the other party to the litigation, to meet or combat or explain the hearsay testimony allowed to be introduced by the experts.

For, ordinarily, who but those who actually participate in sales know the circumstances which prompt and effectuate them?

Conclusion.

There is no conflict between the First and Fourth Circuits; the decision below is proper and will in no way hinder proceedings in condemnation cases. It is respectfully submitted that the writ of certiorari, as requested, should not issue.

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Washington, D.C.